THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

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Case No.: 2014-001215

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Larry E. Koon and Allen Lee Koon by and through his attorney in fact, Larry E. Koon, Respondents,

v.

Thomas Jackson Construction Inc, Appellant.

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# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

In 2006, in Civil Action No. 2006-CP-36-395 (the "original action"), the Appellant, Thomas Jackson Construction, Inc. ("Jackson"), sought a judgment in its favor against the Respondent Allen Lee Koon's ("Koon") business, Lake Murray Tree, Inc. ("Lake Murray"), on an unpaid open account. After the parties agreed to refer the original action to James S. Verner as Special Referee for Newberry County (the "Special Referee"), a judgment was entered with the Newberry Clerk of Court on August 6, 2007 in favor of Jackson in the amount of $25,056.00 following a trial on the merits before the Special Referee. Jackson filed supplemental proceedings in August 2008, because the judgment against Lake Murray remained unpaid. After Koon's failure to produce items requested by subpoena, Jackson filed a Motion for Contempt Order and Sanctions. After a hearing on the motion, the Special Referee issued a sanction pursuant to Rule 37, SCRCP which resulted in an award against Koon, personally, as Lake Murray's sole officer and shareholder, in the amount of $32,858.80. (Record pp. 145-151.) Neither Koon nor Lake Murray ever satisfied the judgment.

On November 24, 2012, Koon was arrested and charged with the murder of his late wife, Cindy Koon. He remains in jail, awaiting trial. On May 15, 2013, Koon, transferred his one-half (1/2) interest in a certain 23.194 acre land parcel to his father, Respondent Larry E. Koon ("Larry Koon"). On May 16, 2013, by Deed of Distribution from the Estate of Cindy Koon, Larry Koon acquired title to the remaining one-half (1/2) interest in the 23.194 acre parcel. Larry Koon did not elect to perform a title search in the instance of either transfer. The above described tract of land is the underlying subject matter of this action. Both Koon and Larry Koon allege that they obtained knowledge of

the judgment attached to the subject property around or about August 2013. Further, Jackson issued a "Partial Release of Judgment" on November 7, 2013 in the amount $11,000.00 against the judgment described above which had been attached to several pieces of Koon's real property. (Record p. 136.)

On February 26, 2014, the Respondents filed the present action against the Jackson seeking to relieve Koon, individually, and Larry Koon, as Koon's attorney in fact, from the personal judgment and for an order directing the Clerk of Court to satisfy the judgment of record. Jackson received service on March 1, 2014.

On March 12, 2014, Jackson filed an Answer, Defenses, and Counterclaim, along with a Motion to Dismiss. A hearing was scheduled on the Motion to Dismiss for April 9, 2014.

On March 27, 2014, Respondents filed a Motion for Summary Judgment. On April 7, 2014, Jackson submitted a Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. On April 8, 2014, Respondents submitted a Reply to Defendant's Counterclaim, a Brief in Opposition to the Motion to Dismiss and in Support of Motion for Summary Judgment, and a Reply to Defendant's Memorandum in Opposition to Motion for Summary Judgment.

A hearing was held on April 9, 2014 before the Honorable Donald B. Hocker. In the Final Order dated May 30, 2104 and filed with the Clerk of Court on June 2, 2014, Judge Hocker entered a judgment in favor of the Respondents, denying Jackson's Motion to Dismiss and granting Respondent's Motion for Summary Judgment.

The Appellant filed a timely notice of appeal on June 4, 2014.

## STATEMENT OF THE FACTS

The instant matter stems from the original action, in which the Appellant, Jackson, sought a judgment in its favor against Lake Murray on an unpaid account. Lake Murray, by and through its sole shareholder and officer, Koon, hired Jackson as a sub-contractor for work relating to Hurricane Katrina clean-up and the Louisiana Disaster Relief programs. Jackson never received compensation for its work in Louisiana, which resulted in the original action. (Record pp. 298-300.)

By Consent Order, the matter was referred to the Special Referee on June 16, 2006. (Record 231-232.) Incident to the Consent Order, the parties agreed to schedule a trial on the merits before the Special Referee on July 11, 2007. Both parties were present, represented by counsel, and allowed to present testimony as to the facts of the case at the July 11 trial. Following the trial, the Special Referee entered an Order, executed on July 31, 2007 and filed on August 6, 2007, which awarded judgment in favor of Jackson in the amount of $25,056.00. (Record 214-216.) On March 27, 2008, an execution against property was issued by the Clerk of Court in connection with the judgment. The execution was returned *nulla bona* on June 28, 2008. (Record 190-195.)

In August 2008, the judgment was still unpaid; therefore, Jackson filed supplemental proceedings against Lake Murray. (Record 183-184.) During the course of these proceedings, Lake Murray, through the actions or failures to act of its sole shareholder and officer, Koon, repeatedly failed to comply with subpoenas and produce requested documents which required numerous Motions to Compel. Furthermore, the documents that were produced by Lake Murray, showed evidence that Koon was funneling money and assets to fund his personal expenses for online poker debts, Harley

Davidson merchandise, the mortgage to his residence, and a Carnival cruise. At the conclusion of the proceedings, the Court granted Jackson's Motion for Contempt Order and Sanctions. The Court took special effort to outline the fact that Koon, as sole shareholder and officer of Lake Murray, was to be held personally liable, pursuant Rule 37, SCRCP, as a sanction for his "complete disregard for legal obligations and compliance with court orders." Therefore, the Court ordered that Jackson be awarded judgment against Koon, personally, in the amount of $32, 858.80, which represented the amount of the judgment against his business, Lake Murray, plus interest, at the rate of 12.25% compounded annually, through December 6, 2009. (Record 146-151.)

**STANDARD OF REVIEW**

It is patent that a trial level judge may dismiss a claim when the Defendant demonstrates that the Plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRCP. A trial judge presiding over a 12(b)(6), SCRCP Motion to Dismiss must construe the Complaint in a light most favorable to the nonmoving party and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the Plaintiff to relief on any theory of the case". Williams v. Condon, 347 S.C. 227, 232-232, 553 S.E.2d 496, 499 (Ct. App. 2001); Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (citing and quoting Williams with approval). On appeal of the trial court's grant or denial of a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the appellate court applies the same standard of review as the presiding trial level judge. Williams, 347 S.C. at 233, 553 S.E.2d at 499.

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). In ruling on a motion for summary judgment, the presiding trial level judge must view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the non-moving party. Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 863 (1997); see also Lord v. D&J Enter., Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 11, 410 S.E.2d 537, 545 (1991) for the proposition that "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact."). The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006).

**ARGUMENTS**

Appellant contends that the trial court erred in two particulars. First, the trial court erred its denying Jackson's Rule 12(b)(6), SCRCP Motion to Dismiss. Second, the trial court's grant of Respondent's Motion for Summary Judgment was improvident. The trial court's errors and abuses of discretion stem from misapplication of the applicable law discussed below.

## I. The trial court erred in denying the Jackson's Motion to Dismiss.

The trial court improperly denied the Appellant's Motion to Dismiss for two reasons. First, the trial court improperly held that that Rule 37(b)(2), SCRCP does not allow for a judgment previously entered against a corporation to later be entered against an individual officer of the corporation, who is not a named party to the original action, as a sanction for discovery abuses. Second, the trial court erred in its conclusion that the instant matter was brought within a "reasonable time" for purposes of setting the judgment aside pursuant to Rule 60(b)(2), SCRCP.

### A. The trial court incorrectly held that Rule 37(b)(2) of the South Carolina Rules of Civil Procedure does not allow the entry of judgment against a corporate officer or managing agent as a sanction.

Rule 37(b)(2), SCRCP, explicitly states:

> If a party **or an officer, director, or managing agent of a party** or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and **among others** the following ... An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. Rule 37(b)(2)(C), SCRCP (emphasis added).

In deciding what sanction to impose for failure to disclose evidence during the discovery process under the rules of civil procedure, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009).

Sanctions imposed for failure to comply with a discovery order generally should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case. Jamison v. Ford Motor Co., 373 S.C. 248, 270, 64 S.E.2d 755, 766 (Ct. App. 2007). Rule 37(b)(2)(C), SCRCP allows the trial court to have discretion to impose a sanction it deems just when a party fails to comply with a discovery order. McNair v. Fairfield County, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (2008). In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 217 (Ct. App. 1997) (finding sanctions imposed by trial judge were not meaningful enough to protect the rights of discovery provided by the Rules). Further, the trial court's decision regarding the imposition of discovery sanctions will not be reversed absent an abuse of discretion. Id. at 216.

Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. Id. at 217. However, when a court orders a sanction that results in a default judgment or dismissal, the "end result is harsh medicine that should not be administered lightly." Griffin Grading & Clearing, Inc. v Tire Serv. Equip. Mfg. Co., Inc., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). When a sanction "would be tantamount to granting a judgment by default, the moving part must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. Id.at 198-199 and 719.

In McNair, this Court presided over an appeal incident to which the Appellant sought to set aside the trial court's order granting Respondent's motion for sanctions, which included provisions that struck Appellant's Answer and dismissed its condemnation action with prejudice. McNair, 379 S.C. at 465, 655 S.E.2d at 831. The trial court then denied Respondent's motion to reconsider its order. On appeal, this Court began by noting that Rule 37(b)(2), SCRCP gives the trial court the authority to impose a sanction it deems just, including dismissing the action, and such a sanction will not be reversed on appeal absent an abuse of discretion. Id. at 465-466 and 832. This Court, citing longstanding South Carolina precedent, noted that a dismissal with prejudice of Appellant's condemnation claim was a severe sanction and, as such, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. Id. However, the trial court made a specific finding that the Appellant had not produced documents within seven and a half months after an order granting Respondent's motion to compel; such a delay prejudiced the Respondent's rights, Respondent was solely to blame for the delay, and such conduct was contemptuous. Id. at 467 and 832. Finding that the trial court applied the appropriate balancing test delineated in Samples, above, this Court found that the trial court did not abuse its discretion in dismissing the Appellant's condemnation action with prejudice despite the harshness of the sanction imposed. Id.

Similarly, in Griffin, this Court presided over an appeal from the trial court's order which struck Appellant's answer and awarded attorneys' fees to the Respondent. Prior to the trial court awarding sanctions under Rule 37(b), SCRCP, the trial court found that Respondent "engaged in a pattern of non-compliance with the South Carolina Rules of

Civil Procedure and with the Orders of [the] Court." Griffin, 334 S.C. 193 at 198, 511 S.E.2d at 718. The trial court noted that Respondent had not received meaningful answers to its interrogatories during the pendency of the two year old action and found that the practice of withholding material evidence constituted a pattern of noncompliance and discovery abuse which was evidence of bad faith and willful disobedience. Id.

On appeal of the trial court's order awarding attorneys' fees and striking Appellant's answer, this Court noted the selection of sanctions for discovery violations is soundly within the discretion of the trial court. Id. Notably, this Court opined that it will not interfere with a trial court's decision unless the trial court abused its discretion. Id. However, this Court also noted that where a sanction is equivalent to entering a judgment by default, the moving party must show bad faith, willful disobedience, or gross indifference to the rights of a party to justify such a sanction. Id. at 199 and 719. With this in mind, this Court was satisfied with the reasoning of the trial court to the extent that the trial court noted:

> "Although striking the defendant's Answer is a harsh sanction, I find no less drastic sanction would be fair in this case. Four prior orders have been issued, without meaningful compliance by the defendant. A lesser sanction of attorney's fees was imposed [in an earlier order], yet that did not result in meaningful compliance by the defendant." Id.

This Court found that the dialogue above evinced the trial court's consideration of the proper factors along with the potential prejudice to the affected party. Id. In affirming the trial court's decision, this Court noted, in conclusion, that "[t]he orders of the trial court are not Shakespearean in nature 'full of sound and fury, signifying nothing.'" Id. In

light of these things, this Court affirmed that decision of the trial court to effectively enter a judgment by default due to repeated, continuous discovery abuses.

The facts and holdings of the lower courts in the cases cited above bear a striking resemblance to those of the instant matter. Here, Koon filed a separate action in an attempt to appeal from or otherwise invalidate an Order sanctioning Respondent for repeated, continuous discovery abuses. In the Order of the Special Referee, incident to which Koon initiated the instant matter for purposes of setting it aside, the Special Referee noted that Jackson instituted supplementary proceedings in August 2008, nearly one year after a final judgment was entered against Lake Murray and nearly two years after the original action was filed. (Record pp. 144-151.) The Special Referee noted that Jackson filed a subpoena shortly after initiating supplementary proceedings, on August 18, 2008 which required Koon to produce documents by September 22, 2008; Koon ignored the subpoena thereby causing a delay in the hearing on Jackson's motion for supplementary proceedings from October 7, 2008 to November 10, 2008. (Id. at pg. 147.) Jackson filed a Motion for Contempt on October 3, 2008 because Lake Murray, by and through Koon, failed to respond to this subpoena. In response, Lake Murray and Koon sent Jackson a package of documents on October 10, 2013. (Id.) At the hearing on November 10, 2008, the Special Referee ordered Respondent to produce additional documentation by January 31, 2009. (Id.) On or about January 27, 2009, after Jackson sent a letter to Koon detailing which documents the Special Referee ordered Lake Murray to produce, Jackson received a package that did not contain all of the ordered documents. (Id.) Jackson then sent a letter requesting that Lake Murray and Koon send all of the mandated discovery documents by March 15, 2009; neither Lake Murray nor Koon ever

responded to this letter. (Id.) On April 13, 2009, Appellant filed a motion to compel the outstanding documents. (Id.) Lake Murray and Koon did not reply to this motion nor did he attend the scheduled hearing on October 21, 2009; however Lake Murray's attorney appeared at the hearing and requested that the Special Referee relieve him as counsel. (Id. at pg. 148.) As result of Respondent's failure to appear, Appellant filed a motion for contempt order and sanctions on November 6, 2009 for which a hearing was scheduled on December 15, 2009. (Id.) Respondent did not appear at the appointed time, but Cindy Koon, Koon's late wife, did fax an "Emergency Motion for Continuance" to the Special Referee, thirty minutes before the scheduled hearing which stated that her father had passed away less than a week prior to the hearing. (Id.) The "Emergency Motion for Continuance" did not include any explanation as to why Respondent did not make any attempt to communicate with Appellant prior to communicating with the Court. (Id.)

As a result of Respondents' year and a half long course of delay, failure to appear, and refusal to comply with orders of the Special Referee, the Special Referee entered an order sanctioning Koon for activity described as "a complete disregard for legal obligations and compliance with Court orders." (Id. at p. 149.) The Special Referee noted that "[t]hroughout the entire case, Defendant, through the actions or failures to act of its sole shareholder, Koon, has repeatedly failed to comply with discovery requests and subpoenas, which has required repeated Motions to Compel." (Id.)

The Special Referee took notice of the documents that Koon elected to provide which yielded the conclusion that he, as the sole shareholder and officer of Lake Murray, used the funds of Lake Murray to pay for personal expenses ranging from the mortgage on his personal residence to online gambling debts. (Id. at p. 148.) The Special Referee

further noted that Koon, as sole shareholder and officer of Lake Murray, transferred several pieces of Lake Murray equipment to himself without consideration well after the judgment against Lake Murray was entered and recorded. (Id. at pp. 149-150.) In issuing sanctions for Koon's ongoing refusal to comply with court orders, which in turn necessitated the filing of several motions to compel, the Special delineated his power to award sanctions pursuant to SCRCP 37(b) (1986), namely:

> "Rule 37(b) of the South Carolina Rules of Civil Procedure ("SCRCP") grants the Court many options in addressing a party's failure to comply with an order under subsection (a) of Rule 37. Subsection 37(b)(2)(C) allows the Court to enter '[a]n order rendering judgment by default against the disobedient party,' and Subsection 37(b)(2)(D) allows the Court to enter an order for contempt in addition to any of the orders authorized by the other subsections of the Rule. Rule 37(b) also allows the Court to order the disobedient party to pay the other party's costs and attorney's fees. (Id. at pg. 3.)

The Special Referee noted that, throughout the case, Lake Murray, by and through the actions of Koon, has "repeatedly failed to comply with discovery requests and subpoenas, which has required repeated Motions to Compel." (Id. at p. 149.) The Special Referee found that "[i]n addition to causing extreme prejudicial delay in the resolution of this matter, the Defendant's actions have caused the Plaintiff to incur great financial expense to obtain that which should have been voluntarily provided." (Id.) The Special Referee found it "apparent that there has been a pattern and practice of distribution of the Defendant's assets for the benefit of Mr. Koon after the Plaintiff's judgment attached to Defendant's assets," and further noted that "it is further apparent that Mr. Koon has no regard for the legal obligations that he is required to meet and that his repeated actions have resulted in the Plaintiff's inability to pursue its legal remedies." (Id. at p. 150.) In

light of these things, the Special Referee found that "[t]he judgment shall attach to Allen Koon, personally." (Id.) Finally, in addition to issuing the sanction described above, the Special Referee ordered the production of the remaining documents; the documents ordered to be produced remain outstanding to this day. Id.

Here, as in McNair and Griffin, the Special Referee issued an order amounting to a judgment by default against a noncompliant officer of a party who engaged in a series of fraudulent conveyances and discovery abuses over the course of several years. The Special Referee in the instant matter, as in McNair, Griffin, and Samples, considered the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice to the Appellant. Here, the Special Referee analyzed the language of Rule 37(b), SCRCP which, on its face, gives authority to "the court in which the action is pending [to] make such orders in regard to the failure as are just, and among others the following..." The Special Referee also correctly noted that he had the authority under Rule 37(b)(2)(C), SCRCP to render a judgment by default against a party or an officer, director, or managing agent of a party. Further, he noted that it may also "[treat] as contempt of court the failure to obey any orders..." per Rule 37(b)(D), SCRCP. Additionally, the Special Referee here, as in McNair and Griffin, issued a strong, but properly reasoned and considered, sanction in order to effectuate a just punishment for Koon's ongoing and continuous discovery abuses and fraudulent conveyances of assets.

In light of the foregoing, this Court should find that the Special Referee's sanction of attaching the judgment against Lake Murray to Koon, its sole shareholder and officer, was well within the authority given to him under Rule 37, SCRCP. With this in mind, the trial court's finding to the contrary was an error of law which amounted to an abuse of

discretion. Accordingly, in light of the trial court's abuse of discretion, this Court should reverse the trial court's order denying Appellant's Motion to Dismiss.

B. The trial court abused its discretion in finding that the instant action was brought within a "reasonable time" as required by Rule 60(b), SCRCP.

Rule 60(b), SCRCP provides that, on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order, because, among other reasons, the final judgment or order is void. Rule 60(b)(4), SCRCP. The language of Rule 60(b), SCRCP does not limit the power of the trial court to entertain an independent action to relieve a party from a final judgment or order; however, such a motion or action to set aside a final judgment or order must be brought within a "reasonable time." Id.; see also McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1997) (finding that, although great uncertainty existed among state and federal appellate courts as to what constituted a "reasonable time" for purposes of Rule 60(b)(4), four year delay rendered motion untimely given facts of the case); Smith Co. of Greenville, Inc. v. Hayes, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993) (finding record revealed no reason to excuse year and a half long delay in seeking to set aside judgment under Rule 60(b)(4)).

A party seeking to set aside a judgment pursuant to Rule 60(b), SCRCP has the burden of presenting evidence entitling him to the requested relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (1991). Whether to grant or deny a motion under Rule 60(b), SCRCP is within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On appeal, this Court is limited to determining whether the trial court abused its discretion in granting or denying such a

motion. Saro Invs. V. Ocean Holiday P'ship, 314 S.C. 116, 441 S.E.2d 835, 840 (Ct. App. 1994).

The trial court cited Sijon v. Green, 289 S.C. 126, 245 S.E.2d 246, (1986), for the proposition bringing an action four years after the entry of judgment is within a "reasonable time" for purposes of Rule 60(b). (Record, p. 7.) The trial court noted that the Court, in Sijon, "[D]id not dismiss the case on the ground that it was not brought within a reasonable time. Therefore, implicitly, the Court found that the case was brought within a reasonable amount of time after Mr. Green learned of the judgments in 1984 that had been entered against him in 1979." (Record at p. 8.)

The Court in Sijon did, as the trial court noted, preside over an action to set aside judgment on the grounds that the moving party did not receive notice of the trial date and was not aware of the judgment against him until four years after its entrance. Sijon, 289 S.C. at 127, 345 S.E.2d at 247. The Court there did, in a footnote mention that Rule 60(b) requires that such an action be brought within a reasonable time, but primarily focused its inquiry as to whether the moving party received notice of court proceedings and the entry of judgment. Id. Interestingly, the Sijon Court disagreed with the trial court's contention that the absence of such notice required, as a matter of law, vacation of the judgments and a new trial. Id. at 128, 247. The Court concluded by holding that:

> "[W]here a judgment roll does not contain evidence that a party-litigant received notice of the hearing or trial where a judgment is rendered, the absent party, upon motion, is entitled to a judicial determination of whether he received proper notice. If it be determined that the party received such notice, the judgment remains; if not, the absent party is entitled to a new trial." Id. (emphasis added).

Similarly, this Court presided over an appeal of the trial court's denial of a party's Rule 60(b) motion to set aside a partition order on the grounds that the value assigned by the partition commissioners amount to a fraud upon the court in Perry v. Heirs at Law and Distributees of Gadsden, 357 S.C. 42, 590 S.E.2d 502, (Ct. App. 2003). Although ruling that the movant could not establish fraudulent intent necessary to set aside the judgment, this Court also evaluated the movant's motion to set aside under Rule 60(b)(5). Id. at 48 and 505. In rendering a decision, this Court noted 60(b)(5) motions must abe filed within a "reasonable time." Id. The court noted that, although it was reluctant to proclaim that four years is a per se unreasonable period of time, the movant failed to put forth an argument as to why a four year delay was reasonable. Id. In light of the movant's failure to posit any reason as to why such a lengthy delay was reasonable, this Court affirmed the trial court's finding that four years was not a "reasonable time", within the meaning of Rule 60(b), to bring such a motion, thus rendering the motion untimely. Id.

In Smith, this Court presided over an appeal of a master's denial of a movant's motion to set aside a judgment under Rule 60(b)(4) and (5). Smith, 311 S.C. at 359, 428 S.E.2d at 901. The movant sought relief from a judgment under both Rule 60(b)(4) and (5) nearly eighteen months after the entry of the judgment. Id. After a review of the record, this Court was unable to discern any reason to excuse the movant's delay in seeking to set aside the eighteen month old judgment. Id. Although explicating its reasoning, *arguendo*, that relief was unavailable under Rule 60(b)(4) and (5), this Court indicated that such analysis was not necessary given the fact that movant's motion was not timely made. Id. at 360 and 902. With these things in mind, this Court affirmed the master's denial of the Appellant's motion for relief from judgment. Id. at 361 and 902.

The facts and circumstances of the instant matter bear a striking resemblance to those of the cases discussed above. Here, the instant action seeks to set aside the order of the Special Referee, filed on February 1, 2010, which awarded judgment against Koon, individually, as sole shareholder and officer of Lake Murray, due to repeated discovery abuses and clear and convincing evidence that Koon was transferring Lake Murray assets to himself in direct violation of court Orders. Koon acknowledged the judgment entered against him in his individual capacity by filing a motion to set the Special Referee's judgment on March 3, 2010. See (Relief from Judgment S.C. Civ. P. Rule 60(b)(4).) Respondents then filed the instant action on February 26, 2014, almost exactly four years after Koon filed his motion to set the judgment against him aside. Further, Jackson filed a partial release of judgment on November 8, 2013 after receiving $11,000.00 from Respondents as partial payment toward the judgment. (Partial Release from Judgment, Record pg. 136).

Here, as in Perry and Smith, the record is replete with indications and inferences that Koon was on notice of the judgment against him in his individual capacity. He filed a motion to set aside the judgment against him in his individual capacity shortly after entry of the judgment and he was a party to the partial satisfaction of the judgment against himself and Lake Murray. As such, it stands to reason that Koon was on notice that a judgment was pending against him in his individual capacity. Here, as in Perry and Smith, Respondents were on notice of a judgment entered against them for nearly four years and chose to ignore the judgment until such a time as was convenient. Further, Respondents in the instant matter have provided no reasoning or logic as to why they waited nearly four year to address a known and acknowledged judgment.

With these things in mind, this Court should follow its previous holdings in Perry and Smith in finding that four years after the fact is not a reasonable time within which to file an action to set aside a known and acknowledged judgment. In light of the extreme delay in contesting a known judgment, this Court should find that the trial court erred in finding that the action to set the Special Referee's order aside was filed within a "reasonable time." Accordingly, this Court should reverse the trial court's order denying Appellant's motion to dismiss.

## II. The trial court erred in granting Respondent's Motion for Summary Judgment.

As shown above, this Court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman, 363 at 536, 611 at 925. This Court should reverse the ruling of the trial court for the following reasons: 1) the trial court erred in finding that the Special Referee lacked personal jurisdiction over Koon in his individual capacity; 2) the trial court applied an improper standard of review when evaluating Respondents' summary judgment motion; and 3) the trial court erred in finding that the Special Referee abused his discretion.

### A. The trial court erred in finding that the Special Referee lacked personal jurisdiction over Koon in his individual capacity.

The court's exercise of personal jurisdiction over a party will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Ex parte S.C. Dept. of Rev., 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002). A court usually obtains personal jurisdiction by the service of the summons and complaint. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644

S.E.2d 793, 796 (Ct. App. 2007). Even though a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. Rule 4(d), SCRCP. No specific act constitutes a voluntary appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." Stearns, 373 S.C. at 338, 644 S.E.2d at 796 (quoting Stephens v. Ringling, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915) with approval).

1. The trial court had personal jurisdiction over Koon, individually, because he made a voluntary appearance.

As shown above, a court usually acquires personal jurisdiction over a party by virtue of the service of a summons and complaint in accordance with the South Carolina Rules of Civil Procedure. Even so, it may also acquire personal jurisdiction if the defendant in question makes a voluntary appearance. Rule 4(d), SCRCP. Although no specific course of action constitutes a voluntary appearance, an appearance may be manifested by a formal written or oral declaration or implied from some action of the party evincing its intention to appear and submit to the court's jurisdiction. Stearns, 373 S.C. at 339, 644 S.E.2d at 797. Given the fact specific inquiry required to render a determination as to whether a party has made a voluntary appearance or not, "courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction." Id. Further, any action by such a defendant which "really amounts to an intent to be in court is also a voluntary appearance." Stephens, 86 S.E. at 685.

Given the reasoning above that no specific act or course of conduct constitutes a voluntary appearance *per se*, it follows that no specific protocol exists for making such an

appearance; however, South Carolina courts have determined that many seemingly innocuous actions amounted to a voluntary appearance, thus conferring personal jurisdiction to the court in question. See Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 389–90 n. 1, 242 S.E.2d 430, 431 n. 1 (1978) (noting that consent has a bearing on the question of jurisdiction over the person in finding that consent to a confession of judgment was equivalent to a voluntary appearance); Connell v. Connell, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (holding that raising the defense of res judicata constitutes a voluntary appearance); Southeastern Equip. Co. v. One 1954 Autocar Diesel Tractor, 234 S.C. 213, 218, 107 S.E.2d 340, 342 (1959) (holding that filing a motion to set aside an attachment constitutes a voluntary appearance).

In Stearns, this Court presided over an appeal from a Master in Equity's ruling in which he entered default judgment against the Appellant and subsequently denied Appellant's Motion to Set Aside his default judgment. Appellant based its appeal on several grounds, most notably that the Master's judgment was void for lack of personal jurisdiction by virtue of improper service and that the judgment in question was attained through excusable neglect. Stearns, 373 S.E.2d at 336, 644 S.E.2d at 795. In finding that the Master did not abuse his discretion in his denial of Appellant's Motion for Relief from Default Judgment, this Court focused its analysis on the issue of whether the Appellant had made a voluntary appearance in spite of Respondent's failure to effectuate proper service. Id.

This Court noted in Stearns that although the Master found, and both parties agreed, that the Respondent did not properly serve the Appellant, the Master was not incorrect in finding that the court obtained personal jurisdiction over the Appellant by

virtue of its voluntary appearance. Id. at 338 and 796. This Court, in reviewing the Master's logic, opined that the critical issue as the facts above was whether Appellant did, in fact, make a voluntary appearance. Id. This Court noted that the term "appearance" is used to signify an overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction. Id. (citing 4 Am. Jur. 2d Appearance § 1 (1995)). Further, this Court indicated that courts should decide whether a party's act evinces an intent to submit to the court's jurisdiction on a case by case basis given the highly subjective inquiry necessary to render such a determination. Id. This Court relied upon the Master's finding that a letter from Appellant's former counsel which recognized Respondent's crossclaim against Appellant, which made no mention whatsoever of an affirmative intent to appear, constituted a personal appearance. Id. at 340 and 797. In arriving at the conclusion that the Master was correct in finding that the letter constituted a personal appearance which conferred personal jurisdiction, the Court noted that the letter manifested an intent to submit to the court's jurisdiction despite seemingly innocuous language. Id. at 341 and 798.

Similarly, the South Carolina Supreme Court in Southeastern presided over an appeal of the trial court's conclusion that Defendant/Appellant had submitted itself to the court's jurisdiction. Southeastern, 243 S.C. at 216, 107 S.E.2d at 341. During the initial action, the Defendant/Appellant made a motion to dissolve an attachment of its property on the grounds that the affidavit supporting the warrant of attachment was insufficient. In addition to its attempt to dissolve the attachment of its property, Defendant/Appellant's counsel also sent a letter demanding a copy of the complaint. Id. The trial court found that the Complaint should be dismissed as to Defendant. Id. Appellant on the grounds that

it was never served with a summons but refused to dissolve the attachment. Defendant/Appellant appealed so much of the court's order as it pertained to the attachment and Plaintiff/Cross-Appellant appealed the court's order to the extent it found that the Defendant/Appellant should be dismissed as a party on the grounds of insufficient service. In rendering a decision on these facts, the Court first turned the issue of personal jurisdiction. Id. at 217 and 341. The Court found that Defendant/Appellant's motion to dissolve the attachment implicitly acknowledged the jurisdiction of the trial court and found that "[w]hen a defendant becomes the actor in an event which impliedly acknowledges, the jurisdiction of the court before disposition of a prior special appearance to test the jurisdiction of his person, he waives the objection raised in the special appearance and becomes subject to the jurisdiction of the court." Id. The Court noted that the above quoted language comported with the then-existing legal statute which, in mirroring today's SCRCP 4(d), provided "[a] voluntary appearance of a defendant is equivalent to personal service of the summons upon him." Id.

Although the facts of Stearns and Southeastern are different in several regards from the facts of the instant matter, the logic and reasoning applied by the courts there are applicable to the facts of this case. Here, as in Stearns and Southeastern, the Respondent is seeking to set aside or otherwise invalidate an existing order of the trial court on the grounds that the order is question is invalid for lack of personal jurisdiction. Further, the Respondents here, by virtue of his "Relief from Judgment S.C. Civ. P. Rule. 60(b)(4)", "gives the court Notice that the Judgment entered against Defendant Lake Murray Tree, Inc. on August 6, 2007 is void for lack of jurisdiction, S.C. Code 32-3-10 (4)." (Relief from Judgment S.C. P. Rule 60(b)(4)). Respondents go on to argue that "the Court must

dismiss the action Sua Sponte for lack of subject matter jurisdiction and declare that the Judgment is void for violation of the Statute of Frauds." Id.

Here, as in Stearns, Koon's attempt to question the trial court's jurisdiction while simultaneously requesting the court's assistance and invoking its power to dismiss the action and set aside its judgment for lack of subject matter jurisdiction and Jackson's failure to comply with the Statute of Frauds. Accordingly, Jackson urges this court to consider the reasoning of the courts in Stearns and Southeastern which were rendered under similar circumstances. Here, as in the cases above, Koon has attempted to invoke the court's authority to invalidate an existing judgment. Therefore, Jackson respectfully requests that this Court apply the reasoning of the courts above in finding that Koon's attempt to submit itself to the trial court's authority constitutes an appearance as a matter of law, thus conferring personal jurisdiction.

2. The trial court had personal jurisdiction over Koon, individually, because he made a general appearance.

Although South Carolina courts have unequivocally asserted that a party's voluntary appearance confers personal jurisdiction, an inquiry must be made as to whether the voluntary appearance is general or special. Whether an appearance is general or special is determined by the relief sought. If a defendant, incident to his appearance, insists and objects only that the court does not possess jurisdiction over his person, and confines his appearance for that purpose only, then he has made a special appearance. Connell, 249 S.C. at 166, 153 S.E.2d at 398. However, if such a defendant raises any other question or asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance. Id. If a party wishes to insist upon the objection that he is not in court, he must keep out for all other

purposes except to make that objection. Id. (citing with approval S.C. State Hwy. Dep't. v. Isthmian S.S. Co., 210 S.C. 408, 43 S.E.2d 132). Further, it is well settled that any appearance in court for any purpose aside from objecting to the jurisdiction of the court is a general appearance; any manifestation of intent to be in court is sufficient. Rainwater Furniture Co. v. Blanton, 246 S.C. 172, 173, 143 S.E.2d 124, 125 (1965).

In Connell, the South Carolina Supreme Court presided over a procedural scenario in which, incident to an action to modify a divorce decree by changing visitation rights, the Appellant filed an 'Answer and Return' in which he stated that he was making an appearance for the purpose of making an Answer and Return, objecting to the jurisdiction of the court, without waiving the same. Connell, 249 S.C. at 164, 153 S.E.2d at 397. In the 'Answer and Return', Appellant requested that the Respondent's "petition be dismissed and for such other relief" to which the appellant is entitled in law and equity. Id. at 165 and 398. Appellant then moved to dismiss the action against him on the grounds that his 'Answer and Return' was a special appearance for the sole purpose of objecting to the jurisdiction of the court. Id. In deciding upon the issue of whether Appellant's action constituted a general appearance conferring personal jurisdiction, the Court noted that the a general appearance is distinguished from a special appearance in that a special appearance only raises the issue of jurisdiction whereas a general appearance raises questions and asks for relief which can only be granted on the hypothesis that the court has jurisdiction over his person. Id. at 166 and 398. After arriving at the conclusion that Appellant's requests and defenses went to the merits of the issues involved, noted that if a party wishes to insist upon the objection that he is not in court, he must keep out of court for all other purposes. Id.

Also addressing the issue of personal jurisdiction, the South Carolina Supreme Court in Rainwater presided over an appeal from court of common plea's reversal of a magistrate's grant of a motion to dismiss based upon a defective summons. Rainwater, 246 S.C. at 172, 143 S.E.2d at 124. At issue was whether the trial court properly found, in reversing the magistrate, that the court had personal jurisdiction, despite a defective summons, when the defendant appeared at the scheduled trial date, struck and seated a jury, and then moved for dismissal based upon lack of jurisdiction. Id. at 173 and 125. The circuit court judge, in finding that the magistrate had personal jurisdiction over the defendant, noted that when a defendant appears generally, without reservation of right to object to the failure of jurisdiction as result of a defective summons, he waives such an objection. Id. The Court, on appeal, noted that such an appeal was "clearly without merit," because a party waives any objection to jurisdiction of the person by making a general appearance in an action. Id. The Court further noted that it is "well settled" that any appearance in court for any purpose other than objecting to the jurisdiction of the court is a general appearance. Id. In finding that the conduct above constituted a general appearance that conferred personal jurisdiction, the Court concluded its analysis by stating that any manifestation of intent to be in court is sufficient to constitute a general appearance. Id. As such, the Court concluded that the circuit court was correct in finding that the defendant's appearance to select a jury conferred personal jurisdiction to the magistrate. Id.

The facts above are analogous to those of the instant matter. Here, as in Connell and Rainwater, Koon has attempted to avail himself of the trial courts authority while simultaneously maintaining that the trial court was without personal jurisdiction over

him. In the instant matter, Koon has attempted to seek relief from an otherwise valid judgment over him while, at the same time, rejecting the court's authority to exercise jurisdiction over him. As noted above in Rainwater, any appearance for any purpose whatsoever, aside from objecting to the jurisdiction of the court, is a general appearance. Further, as shown in Connell, if Koon wished to insist upon the objection that he is not was court, he should have kept out of court for all other purposes.

In light of the reasoning contained above, it is clear that any appearance for any purpose aside from contesting a court's exercise of personal jurisdiction over the appearing party constitutes a general appearance. Here, Koon has made an appearance incident to which he has requested that the court set aside its judgment "for lack of subject matter jurisdiction and declare that the Judgment is void for violation of the Statute of Frauds." (Relief from Judgment S.C. P. Rule 60(b)(4).) As such, Koon has appeared to request relief other than questioning the court's jurisdiction. Accordingly, this Court should find that Koon has made a general appearance which created personal jurisdiction in lieu of the service of a summons.

3. The trial court had jurisdiction over Koon, individually, because he waived the issue of personal jurisdiction.

By making a general appearance in an action, a defendant waives any objection as to personal jurisdiction. Rainwater, 246 S.C. at 173, 143 S.E.2d at 125; see also Cone v. Cone, 61 S.C. 51, 39 S.E. 748 (1901) (finding by making a general appearance and answer, a defendant waived an objection that the court has not acquired jurisdiction of his person), Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984) (finding that a party who made a general appearance waived its objection to the court's lack of personal jurisdiction).

Here, as established above, Koon has made a general appearance by virtue of his appearance to request that the court invoke its authority to set aside a judgment. Additionally, Koon appeared at some of the Special Referee proceedings, answered a portion of the required discovery requests issued to him in supplementary proceedings, and filed a Motion for Continuance by and through his late wife. As Koon has made a general appearance, he has waived his right to contest the court's jurisdiction over his person. Accordingly, this Court should find that Respondent is not entitled to litigate an issue he has waived by virtue of his acknowledgment of the trial court's authority.

B. The trial court incorrectly granted summary judgment after failing to apply the proper standard of review.

Summary judgment is proper when there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. Summary judgment can only be granted in those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ; all ambiguities, conclusions and inferences arising in and from the evidence must be construed most strongly against the movant for summary judgment. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. USAA Prop. and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). If there is a dispute as to the conclusion to be drawn from the evidentiary facts, summary judgment should not be granted even when there is no dispute as to evidentiary facts themselves. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to

withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009).

The Court in Standard Fire Insurance Company v. Marine Contracting and Towing Company, et al. reversed the trial court's partial grant of summary judgment on the grounds that the record in the case was insufficient to support such a grant. Std. Fire Ins. Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). The trial court made a partial grant of summary judgment on the grounds that the insurance policy in question afforded coverage for the incident out of which the controversy arose. Id. at 420 and 461. The insurer appealed, claiming the several exclusions applied. Id. In rendering a decision on the matter, the Court noted that, although a grant of summary judgment is appropriate if it is clear that no genuine issue of material fact exists, such a grant is improvident if it is desirable to clarify the application of the law. Id. at 422 and 42. The Court, in reversing the circuit court's grant of summary judgment, found that the record was devoid of pleadings and affidavits as well as dates chronicling the controversy. Id. Given the glaring lack of evidence for the trial court to review, the Court found that a grant of partial summary judgment was improper. Id.

Here as in Standard Fire, the trial court rendered a decision without delving into the facts to an extent sufficient to support a grant of summary judgment. Here, the trial did not view all evidence in a light most favorable to the non-moving party/Appellant; the trial court assumed that every statement made by the Respondent was true. See (Record pg. 16) (construing affidavits of Larry Koon and Koon in light most favorable to moving party); (Record pg. 16) (finding that affidavits of Larry Koon and Koon were unconverted despite evidence presented at hearing to the contrary). As such, it is clear

from the record that there was insufficient evidence to support the trial court's grant of summary judgment as further inquiry was necessary to properly determine whether Koon made a personal appearance which conferred personal jurisdiction. Further, the trial court applied the incorrect standard of review by virtue of viewing all evidence submitted in a light most favorable to the moving party rather than the non-moving party. Accordingly, this court should reverse the trial court's grant of summary judgment.

C. The trial court incorrectly granted summary judgment after an erroneous finding that the Special Referee abused his discretion.

An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. Holmes v. E. Cooper. Comm. Hosp., Inc., 408 S.C. 138, 758 S.E.2d 483, 499 (2014).

The court's exercise of personal jurisdiction over a party should not be disturbed on appeal unless wholly unsupported by the evidence or strongly influenced by an error of law. Indus. Equip. Co. v. Frank G. Hough Co., 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950) ("The question of jurisdiction has often confounded the wisest of courts and for that reason this Court has adhered to the rule that a finding by the Circuit Court as to jurisdiction or lack of jurisdiction will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.").

As discussed at length above, the Special Referee did not make an erroneous finding or application of law or rely upon unsupported factual conclusions in exercising personal jurisdiction over Koon. With this in mind, the Special Referee did not abuse his discretion in making such a finding. Thus, his exercise of personal jurisdiction should not have been disturbed, because his finding was supported by evidence and reached only after the review and application of relevant case law. As such, the trial court was incorrect

in finding that the Special Referee abused his discretion by exercising personal jurisdiction over Koon and, thus, erred in granting Respondent's Motion for Summary Judgment.

## CONCLUSION

In light of the forgoing, Appellant respectfully requests that this Court reverse the ruling of the trial court by adopting Appellant's contentions that:

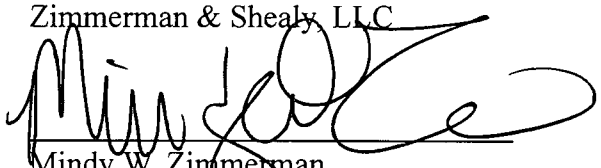
1) The trial court erred in denying Appellant's Motion to Dismiss; and

2) The trial court erred in granting Respondent's Motion for Summary Judgment.

As such, the trial court's ruling should be reversed and the Special Referee's Order should be reinstated.

Respectfully submitted,

Zimmerman & Shealy, LLC



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August 14, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge



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Case No.: 2014-001215

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Thomas Jackson Construction,

Appellant,

v.

Larry E. Koon and Allen Lee Koon
By and through his attorney in fact,
Larry E. Koon,

Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned, Donald F. Zimmerman, hereby certifies that on the 8th **day of December, 2014**, he has served the following upon counsel for the Respondent on copy of the Appellant's Brief and the Appellant's Reply Brief by mailing and depositing the same with the United States Postal Service, first class mail, postage prepaid to the address below:

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